United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,752

DAVID BATTLE,
Appellant
v.
UNITED STATES OF AMERICA,
Appellee

No. 18,756

MICHAEL F. DAVIS,
Appellant
v.
UNITED STATES OF AMERICA,
Appellee

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Appeal from Judgment of United States
District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. Were appellants entitled to a hearing before trial and out of the presence of the jury on a Motion to Suppress Evidence filed well before trial?

2. Did probable cause exist to arrest appellants where the only testimony by the arresting officer was that he saw two men run down the street and into a private residence, one of whom looked as though he was carrying something under his coat and the officer later received a report of a robbery?

3. Does the failure of the trial judge to grant appellants a hearing, before trial and out of the hearing of the jury, on the Motion to Suppress require that defendants be granted a new trial incorporating a pre-trial hearing out of the presence of the jury?

4. Did the arresting officer properly announce his authority and purpose prior to gaining entry to the appellants' residence?

5. Were the limitations placed by the trial Judge on defense counsel's cross-examination of the complaining witness such as effectively to deny appellants constitutional right of confrontation and cross-examination?

6. Was the closing argument of counsel for appellant Davis a concession of guilt so as to waive appellant's plea of innocent and to deny them effective counsel and a fair trial?

7. Was the trial Judge's summarization of the evidence such as to deny the appellants' right to a fair and impartial determination of the evidence by the jury?

8. Was the conduct of the trial considered as a whole, such as to deny appellants a fair and impartial trial?

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IN THE UNITED STATES COURT OF APPEALS
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No. 18,752

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Appeal from Judgment of the United States
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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellants were tried in the United States District Court for the District of Columbia, Judge Alexander Holtzoff presiding, on May 20 and 21, 1964, on the charges of robbery and assault with a dangerous weapon under D. C. Code, Sections 22-2901 and 22-502, respectively. On May 21, 1964, the jury returned verdicts of guilty of robbery and simple assault as to both defendants. On June 22, 1964, Judge

Holtzoff sentenced both defendants to four to twelve years on the robbery charge and one (1) year on the simple assault charge, to run concurrently with the sentence on the robbery charge. Leave was granted both defendants to appeal in forma pauperis.

The jurisdiction of this Court is founded on Title 28, United States Code, § 1291.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction of robbery and simple assault resulting from a trial by jury before Judge Alexander Holtzoff under an indictment charging appellants with robbery in violation of 22 D.C.C. 2901 and assault with a dangerous weapon in violation of 22 D.C.C. 502.

Weeks prior to the trial, appellants filed a timely motion under Rule 41(e) of the Rules of Criminal Procedure for the United States District Courts to suppress the use of certain evidence against appellants including a black leather pocketbook and its contents and any evidence of identification made of appellants at Precinct No. 10 of the Metropolitan Police Department after appellants' arrest on the grounds that such evidence was obtained as the result of appellants' illegal arrest without a warrant and without probable cause in violation of the Fourth Amendment as well as the illegal entry by police officers into the residence of appellant Davis to effect such arrest. (Tr. R. Motion to Suppress Evidence, dated April 30, 1964)*

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*References herein to the "Transcript of Record" will be designated as (Tr. R); References to the Trial Transcript as (Tr XX); and references to the Trial Transcript of Closing Arguments as (Tr.C.A. XX).

Appellants' Motion to Suppress Evidence came on for hearing before Judge Tamm on May 8, 1964, but he was unable to reach this motion and referred it to the trial Judge to be heard as a preliminary matter before trial. (Tr. R., Order of Judge Tamm dated May 8, 1964). When the case was reached for trial on May 20, 1964, before Judge Holtzoff, defense counsel brought the motion to the Court's attention before the jury was impanelled and requested a hearing, but the trial Judge refused to hear it at the time, stating "I think you can make your objection if the evidence is tendered by the prosecution and then at that time I can ask the jury to withdraw and we will hear the matter". (Tr. 4)

The Government's first witness, the complainant, Mrs. Camara testified on direct examination that at approximately 7:00 P.M., February 22, 1964, she and her husband were walking along Euclid Street between 15th Street and University Place when they were attacked by two men. The taller of the two men knocked her husband to the ground by striking him in the jaw with his fist, while the other man threw the complainant to the ground in an unsuccessful attempt to take her pocketbook. Thereafter the taller man who, after striking complainant's husband, had run to the corner of University Place returned and took her purse and both men ran in the direction of University Place. The

complainant, at the request of the Prosecutor, Mr. Weitzel, then identified for the Court and jury, appellants as the men who had committed the aforedescribed attack and taken her pocketbook. (Tr. 10-15)

When on cross-examination by the appellant Battle's defense counsel, the complainant gratuitously referred to her identification of appellants at the police station and defense counsel moved to have that portion of her answer stricken as being not responsive and the jury instructed to disregard it, the court stated (Tr. 17):

> "Let it be stricken. The same information can be brought out other ways, so it is not particularly important whether it is responsive or not. I think, no doubt, Mr. Weitzel can bring this out on redirect examination if he wishes to."

Subsequently, complainant admitted that she did not wear glasses, but further cross-examination on this important aspect of the critical issue of complainant's identification of appellants as her assailants was precluded when the following colloquy between the trial Judge and appellant Battle's defense counsel occurred (Tr. 19):

> Q: Have you had your eyes examined to determine--
>
> The Court: I am not going to permit that.
>
> Mr. Hickey: May I state for the Court--
>
> The Court: No, you may not state anything. I will exclude that. You can't invade the witness' privacy to that extent.

Cross-examination of the complainant seeking to elicit her condition at the time of the attack and thus clearly relevant to the reliability of her identification of appellants was also summarily excluded by the Court (Tr. 24).

After completion of defense counsel's cross-examination, and over the objection of defense counsel, the trial Judge permitted the Government to reopen their direct examination of complainant in order to obtain her identification of, and thus introduce into evidence the pocketbook referred to in the Motion to Suppress (Tr. 29-32). The pocketbook was admitted into evidence as Government's Exhibit No. 2 (Tr. 32). Defense counsels' request to approach the bench and be heard on the admission of the pocketbook into evidence was refused by the trial Judge and defense counsels' objection to the admission thereof was overruled without a hearing with the jury excluded (Tr. 33).

The Government's second witness, the complainant's husband, Mr. Camara merely corroburated his wife's testimony that they had been attacked by two men, but stated he "could not identify them". (Tr. 38-40)

The last Government witness, Detective Boyd, one of the arresting police officers was then called by the Government. Detective Boyd's testimony shows that his entry into a rooming house at 1447 Fairmont Street where

appellant Davis was a resident and his arrest of both appellants therein was predicated solely on the following: his observation at approximately 7:15 or 7:20 P.M. on February 22, 1964, of two Negro men, one wearing a light trench coat and the other a dark trench coat, and one of them appearing to be holding something under his coat, running north in the University block and their entry into the premises at 1447 Fairmont Street; and his subsequent receipt of a report of a robbery (Tr. 43-44). As to his entry into the premises at 1447 Fairmont Street, Detective Boyd testified that he knocked on the door and was admitted by a Mrs. Parker after merely identifying himself as Detective Boyd of the Metropolitan Police Department, receiving a negative reply to his inquiry as to whether she had observed two Negro men running into the premises and after an affirmative answer to his inquiry as to whether any young men lived on the premises. Detective Boyd did not announce his purpose prior to or during his entry into the premises (Tr. 44-45). Defense counsels' objections to Detective Boyd's testimony as to what he heard inside the house as being heresay were overruled by the trial Judge (Tr. 45). Similarly, when defense counsel, at the bench, again sought a hearing on his Motion to Suppress material observed and taken inside the house the trial court in effect refused a hearing on the motion out of the presence of the jury in the

following colloquy between the trial Judge and defense counsel (Tr. 46).

> The Court: I understand, but there is no evidence yet of any material taken inside the house. For all I know, it may not be offered.
>
> Mr. Hickey: Well, your Honor, in the manner the witness is testifying, I am afraid that I am unable to interpose my objection in a timely fashion.
>
> The Court: You can move to strike any object if it is improperly introduced. You have to wait until an object is offered and then you can note an objection. You may proceed.

Detective Boyd went on to testify that as a result of a conversation with a Mrs. Gladys Williams on the second floor of the premises, he went further upstairs and knocked on the door of Room 9 which was opened by a Negro man he recognized as one of the men he had previously observed running and later identified to him as the appellant Davis herein; that he identified himself as a policeman and asked "where was the pocketbook he had just snatched"; that Davis stated he did not know anything about a pocketbook and did not have a pocketbook and told him that he could search the room; and that he placed Davis, and Battle, the other appellant herein, who was also in the room, under arrest and took them outside of the 1447 Fairmont Street premises after conducting a search of the room. As in the initial entry to the

premises, Detective Boyd did not announce his purpose prior to or during entry into appellant Davis' room (Tr. 47-48).

When defense counsel then moved to strike the testimony of Detective Boyd as to "all the incidents that he either observed or heard while in the house until the motion pending has been passed on" (Tr. 48), the trial Judge summarily ruled on the motion to suppress at the bench with the jury present in the following colloquy with counsel (Tr. 49-50):

(AT THE BENCH:)

The Court: What is your motion?

Mr. Hickey: The motion that has been filed, Your Honor--

The Court: I don't care anything about filing. Tell me what it is.

Mr. Hickey: It is a motion to suppress evidence, including all materials taken or observed in the house at 1447 Fairmont.

The Court: No objects as yet have been offered in evidence. I will pass upon that when the objects are offered, if they are offered.

So far as what was observed, the only thing that the Officer observed was that the pocketbook wasn't there.

Mr. Hickey: Your Honor, his testimony, the Officer's testimony as to all the occurrences in the house--

The Court: On what ground do you object to them?

Mr. Hickey: Three grounds, Your Honor.

The Court: One good one is enough. Generally when people have three, none of them is any good. If you have a good one just state it first.

Mr. Hickey: First, that there was no probable cause for the arrest.

The Court: I rule that there was probable cause. When an officer gets a report within a few minutes after a robbery and he had seen a minute or two before a man run down the street -- adult men don't generally run down the street; children do -- why, I think that is enough probable cause to arrest him.

Mr. Hickey: Your Honor, my recollection of his testimony is --

The Court: I have ruled.

Mr. Hickey: Would Your Honor rule on my other ground also?

The Court: Yes, I will hear your other grounds.

Mr. Hickey: The other ground is that the entry into the residence of the defendant Davis was not made in accordance with the form required by the statute.

The Court: Objection overruled. The entrance to the outer door was made lawfully because he knocked on the door and Mrs. Parker admitted him. When he came to the defendant's door he knocked on the door and the defendant opened the door and admitted him, and the officer identified himself as such. That is perfectly lawful. He didn't have to use a visiting card, you know, send his visiting card in.

Thereafter, Detective Boyd in response to the Prosecutor's inquiry testified that after taking Davis and Battle out of the 1447 Fairmont Street premises, Mrs. Gladys Williams, the woman he had previously conversed with inside the premises,called "Officer, there is a pocketbook, were you looking for it?", and thereupon gave him the pocketbook which he identified as Government's Exhibit 2 (Tr. 52-53). While the trial Judge cautioned the Prosecutor against bringing in what other people said , the Court did not rule that Detective Boyd's testimony as to Mrs. Williams' statement be stricken (Tr. 52).

At the close of Detective Boyd's testimony, defense counsel approached the bench and again moved to strike all of the officer's testimony relating to occurrences within the house and to the obtaining of the pocketbook, on the grounds set forth in the Motion to Suppress (Tr. 60). Judge Holtzoff again denied the Motion (Tr. 61) stating in the course of such denial that Detective Boyd's statements about his conversation with Mrs. Williams had been stricken (Tr.60).

In his closing argument to the jury, appellant Davis' defense counsel, Mr. Lawson, made statements readily susceptible to the interpretation by the jury that the defense conceded the critical issue of the accuracy of Mrs. Camara's identification of Davis and Battle as her assailants and that his suggestions that the jury could find reasonable

doubt as to appellant's guilt were contrary to his personal feelings and were made only as a matter of form to fulfill his duty as counsel (Tr. C.A. 12).

In his charge to the jury, summarizing the evidence, the trial Judge characterized as fact, the very issue of fact to be determined by the jury, namely, the identification of appellants as the assailants of Mr. and Mrs. Camara. (Tr. 75-76) Moreover, the trial Judge supplemented rather than summarized the evidence when he stated that "the pocketbook was also in the house" in which appellants were arrested. (Tr. 77)

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitution

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Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

18 U.S.C. 3109

Breaking doors or windows for entry or exit.--- The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. (June 25, 1948, c. 645, Section 1, 62 Stat. 820)

Rule 41(e)
Motion for Return of Property and to Suppress Evidence

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is

granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF POINTS

1. There was no probable cause for appellants' arrest.
2. Failure of arresting officer to announce his purpose and authority prior to entering appellant Davis' rooming house and room invalidated appellants' arrest.
3. Appellants were entitled prior to trial to a hearing on their Motion to Suppress Evidence.
4. Failure of the lower Court to grant appellants a hearing prior to trial on their Motion to Suppress Evidence requires a new trial be granted them.
5. Trial Court's restrictions on cross-examination by defense counsel was prejudicial error.
6. Closing argument by defense counsel for appellant Davis contained matter prejudicial to appellants.
7. Trial Court's conduct of trial and summary of evidence was prejudicial argument.

SUMMARY OF ARGUMENT

1. The officer who arrested appellants knew only that the appellants ran down the street, one of them appeared to be holding something under his coat and that he received a report of a robbery. Since these facts do not provide probable cause, appellants' arrest predicated thereon is illegal and evidence obtained incident thereto is inadmissible against appellants. Wong Sun v. United States, 371 U.S. 471 (1963) and Miller v. United States, 116 App. D.C. 45, 320 F. 2d 767 (D.C. Cir. 1963); Gatlin v. United States, 326 F. 2d 666 (D.C. Cir. 1963) and Taglavore v. United States, 291 F. 2d 262 (9th Cir. 1961).

2. Regardless of probable cause, the arrest and search were illegal and evidence obtained as a result thereof inadmissible against appellants since the arresting officer failed to announce his purpose and authority prior to entering appellant Davis' rooming house and room to effect the arrest and search. Title 18, United States Code §3109, Miller v. United States, 357 U.S. 301 (1958) and Gatlin v. United States, 326 F. 2d 666 (D.C. Cir. 1963)

3. The failure of the District Court to grant appellants a pre-trial hearing on their Motion to Suppress

Evidence, out of the presence of the jury, was an abortion of the judicial process and prejudicial error which prevented appellants' counsel from effectively preparing for trial and presenting their defense and can be cured only by granting a new trial and a hearing prior to such trial of their Motion to Suppress Evidence. Rule 41(e) Federal Rules Criminal Procedure; McNabb v. United States, 318 U.S. 332, 345 (1943); and Mapp v. Ohio, 367 U.S. 643, 659 (1961).

4. The Trial Judge on two occasions refused to allow defense counsel in cross-examination to ask the complaining witness questions relative to the crucial point of identification of appellants as the assailants and, for all practical purposes, denied appellants their Constitutional right to confrontation and cross-examination. Amendment VI, Constitution of the United States of America; Lindsey v. United States, 77 App. D.C. 1, 133 F.2d 368 (D.C. Cir. 1942); J. E. Hanger, Inc., et al v. United States, 81 App. D.C. 408, 160 F. 2d 8 (D.C. Cir. 1947)

5. Appellant Davis' counsel in his closing argument conceded the identification of appellants by the complaining witness and further conceded by implication their guilt; consequently denying both of the appellants effective representation and a fair trial. Clark v. United States, 104 App. D.C. 27, 259 F.2d 184 (D.C. Cir. 1958).

6. The Trial Judge unfairly summarized the evidence by stating as a fact a matter which was not in evidence and by implying that certain allegations by the complaining witness were facts. The Trial Judge in his conduct of the trial, by repeatedly denying defense counsel's objections to the admission of evidence, by restricting defense counsel's cross-examination and in his summary of the evidence, evinced a bias against appellants' cause which must have prejudiced appellants before the jury. Peckham v. United States, 93 App. D.C. 136, 210 F.2d 693 (1953); Blunt v. United States, 100 App. D.C. 266, 244 F.2d 355 (D.C. Cir. 1957); Quercia v. United States 289 U.S. 466 (1933)

ARGUMENT

I. NO PROBABLE CAUSE EXISTED FOR THE ARREST OF APPELLANTS AND THUS THE ENTRY INTO APPELLANT DAVIS' ROOMING HOUSE WAS ILLEGAL AS WAS THE ARREST OF APPELLANTS AND THE SEARCH OF THE ROOMING HOUSE BY THE ARRESTING OFFICER WAS ILLEGAL AND CONSEQUENTLY ALL EVIDENCE SECURED BY OR ARISING OUT OF THE ILLEGAL SEARCH IS INADMISSIBLE.

With respect to Point I, appellants desire the Court to read the following pages of the reporter's transcript of the trial: Tr. 42-48, 50.

Officer Boyd, the arresting officer, testified that he saw the appellants running "north in the University block intersection, Fairmont Street, Northwest, "at about 7:15 or 7:20 (Tr. 43). He further testified that one of these two individuals appeared to be carrying something under his coat and holding it with his right hand. He also affirmed that he later received a report of the robbery of the Camaras (Tr. 44).

He testified that he then went to 1447 Fairmont Street, Northwest, the place into which the appellants entered, knocked on the door and identified himself as a police officer to Mrs. Parker who answered the door. Boyd stated that in response to his inquiry, Mrs. Parker stated that while she had not observed two young Negro men running into

the house, some young men lived there and he could come in and go upstairs to look for them (Tr. 44-47). Boyd further stated that he did go upstairs, meeting and talking with a Mrs. Gladys Williams and, as a result thereof, then going to room no. 9, where he knocked on the door. According to Boyd, appellant Davis answered the door and Boyd identified himself as a police officer and asked Davis what he had done with the pocketbook he had just stolen. Boyd stated Davis denied he had stolen a pocketbook and told Boyd he could search the room. Boyd testified that he then placed Davis under arrest and searched the room without finding a pocketbook (Tr. 47-48).

Thus, Officer Boyd, without any justification other than the fact that he observed two Negro men running down the street, one of whom appeared to be carrying something under his coat, and the fact that he later received a report of a robbery, arrested the appellants.

The record does not indicate that Officer Boyd had any knowledge of the time or place of the robbery or any description of the robbers.

We are forced to conclude that his only basis was appellants' act of running with one of them having something under his coat. Boyd had no basis to conclude that appellants were running from any place or person, but merely that they

were running.

But the courts have held that even flight the running with a guilty consciousness is merely a circumstance and is inconclusive, standing alone of guilt. Miller v. United States, 1963, 116 App. D.C. 45, 320 F.2d 767. Here there is no circumstance at all from which a consciousness of guilt can be inferred.

A police officer may make an arrest without a warrant where he has probable cause to believe that a felony has been committed and that the person to be arrested has committed such felony. Bell v. United States, 102 App. D.C. 383; 254 F.2d 82 (D.C. Cir. 1957) "Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they have reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." "Probable cause means more than bare suspicion." Taglavore v. United States, 291 F.2d 262, 266 (9th Cir. 1961) quoting Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310 (1949). See also Gatlin v. United States, ___App. D.C.____, 326 F.2d 666 (D.C. Cir. 1963).

Appellants submit that no reasonable man having only the information which Officer Boyd is shown to have had would

be warranted in believing anything more than that two men were running down the street. We are unable to agree with the trial court's conclusion that only children run down the street (Tr. 50). And thus, appellants contend that Officer Boyd did not have the probable cause required to arrest appellants without a warrant. Appellants are thus compelled to the conclusion that their arrest was illegal and that all evidence secured by or arising out of the illegal arrest and search by Officer Boyd is inadmissible. See Wong Sun v. United States, 371 U.S. 471; 83 S.Ct. 407 (1963)

II. THE ARRESTING OFFICER ILLEGALLY ENTERED APPELLANT DAVIS' ROOMING HOUSE AND ROOM, SINCE HE FAILED TO ANNOUNCE HIS AUTHORITY AND PURPOSE PRIOR TO ENTRY AS REQUIRED BY LAW AND THUS HIS SEARCH OF THE ROOMING HOUSE AND ROOM WAS ILLEGAL AND ALL EVIDENCE SECURED BY OR ARISING OUT OF THE ILLEGAL SEARCH IS INADMISSIBLE.

With respect to Point II, appellants desire the Court to read the following pages of the reporter's transcript of the trial: Tr. 43-47.

Officer Boyd testified that he knocked on the door to appellant Davis' rooming house and identified himself as a police officer to Mrs. Parker who answered the door, and asked her if she observed two young Negro men running into the premises. Boyd stated that Mrs. Parker said she had been in the back of the premises and had not seen the men to which he referred, but in response to his further inquiry as to whether any young men lived there, answered "yes" and gave him permission to enter the premises, and that he went to room no. 9 on the second floor. Boyd further stated that he identified himself as a police officer to appellant Davis who answered Boyd's knock on the door of room no. 9. Boyd then testified that he asked Davis where the pocketbook was that he had stolen and Davis denied stealing the pocketbook and told Boyd he could search his room for the pocketbook whereupon Boyd placed Davis under arrest and searched the

room (Tr. 43-47).

Title 18, Section 3109 U.S.C. provides that an officer may break and enter a house to execute a search only where, after announcing his purpose and authority, he is refused admittance. See Miller v. United States, 357 U.S. 301 (1958).

The rule requiring that police officers announce their purpose and authority prior to entering a house to make a search has been held to include situations where no actual refusal of admittance and breaking of a door or other part of the house was involved and where the search is made without warrant. Gatlin v. United States, ____App. D.C.____, 326 F.2d 666, 673 (D.C. Cir. 1963)

Here the arresting officer, ignoring the statutory requirement, did not announce his purpose of arresting appellants either before he entered Davis' rooming house or his room and thus the entry, and the arrest were illegal and the evidence which was the fruit of such illegal entry and arrest inadmissible against appellants.

The record does not indicate that any unequivocal and specific consent to the search was freely and intelligently given by appellants, See Gatlin v. United States, Supra.

Thus, even if probable cause for appellants arrest without a warrant existed, the entry into Davis' rooming house was illegal due to the failure of the police officers to announce their purpose prior to entry and consequently all

evidence secured by or arising from the illegal search is inadmissible. Gatlin v. United States, Supra.

III. THE FAILURE OF THE LOWER COURT TO GRANT APPELLANTS A PRE-TRIAL HEARING ON THEIR MOTION TO SUPPRESS EVIDENCE REQUIRES THAT APPELLANTS BE GRANTED A NEW TRIAL AND A HEARING ON SUCH MOTION PRIOR TO THE NEW TRIAL.

With respect to Point III, appellants desire the Court to read the following pages of the reporter's transcript of the trial: Tr. 3, 4, 33, 45-50, 60, 61, appellants' pre-trial motion to suppress evidence and order of Judge Tamm dated May 8, 1964 (Tr. R.)

The IV Amendment to the Constitution provides in part "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated ...". This has been implemented by Rule 41(e) of the Federal Rules of Criminal Procedure which provides that " [a] person aggrieved by an unlawful search and seizure may move ... for the return of the property and to suppress for the use as evidence anything so obtained ..." A moveant is entitled to have a hearing on his motion prior to trial, in fact, even prior to indictment if timely made and the Court does not have the discretion to deny a pre-trial hearing on the Motion. See Austin v. United States, 297 F.2d 356 (4th Cir. 1961). See also United States v. Marshall, 24 F.R.D. 505 (D.D.C. 1960), and 4 Barron, Federal Practice and Procedure, § 2405 at 374

(Supp. 1963).

The Government concedes that there should have been a hearing on the matter at or before trial and has offered to consent to an immediate remand for a hearing as to whether there was probable cause for appellants' arrest and thus whether the search made in connection therewith was legal. See letter dated October 7, 1964 to counsel for appellants, copy sent to Clerk's Office.

Appellants are of the opinion, however, that an ex post facto hearing is not an adequate remedy for the lower Court's failure to grant them a pre-trial hearing on their Motion to Suppress Evidence. It is appellants' contention that they are entitled to both a hearing and a new trial prior to which their hearing can be held.

The failure of the Trial Court to grant appellants a pre-trial hearing on their Motion to Suppress denied appellants a right to which they were entitled and which would have aided them in preparing for the trial. Appellants were entitled to know prior to trial whether or not the challenged evidence would be inadmissible as illegally seized. Failure to have such knowledge prior to trial, as they were entitled to, prejudiced appellants in their preparation for and presentation of the trial.

To permit rectification of this error by merely remanding the matter to the lower Court for a hearing on probable

cause would encourage the Government in subsequent cases to attempt to convince the Court to deny defendants the right granted them under Rule 41(e) to a pre-trial hearing since the worst that could happen would be a remand for the limited purpose of a hearing on this question. The Government is thus given the unfair advantage of denying to defendants' information to which they are entitled and which could in large measure, shape their trial tactics and strategy.

The Court is also required to grant appellants a new trial, rather than merely an "after the fact" hearing on the pre-trial motion, in order to protect the integrity of the administration of justice. To this end, the courts have found the exclusion of relevant and entirely trustworthy evidence necessary to provide an effective sanction against illegal search, seizure, arrest and detention. See Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332, 345 (1943) and Mapp v. Ohio, 367 U.S. 643 (1961). Appellants submit that the only effective sanction to prevent the denial of the rights granted under Rule 41(e) is to grant defendants in circumstances such as these a new trial and a hearing prior to such trial on their Motion to Suppress Evidence. Failure to do so nullifies the provision of Rule 41(e).

IV. THE RESTRICTIONS PLACED BY THE LOWER COURT ON THE DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE COMPLAINING WITNESS HAD THE EFFECT OF DENYING APPELLANTS THEIR CONSTITUTIONAL RIGHT OF CONFRONTATION AND CROSS-EXAMINATION.

With respect to Point IV, appellants desire the Court to read the following pages of the reporter's transcript of the trial: Tr. 19, 24.

Trial counsel attempted to ascertain whether the complaining witness had had her eyes examined (Tr. 19) and what her condition was at the time of the attack (Tr. 24) and the trial Judge, without objection from the prosecutor, refused to allow the questions to be asked.

The VI Amendment to the Constitution provides in part "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The right of confrontation necessarily includes cross-examination and cross-examination is a right, not merely a privilege. Lindsey v. United States, 1942, 77 App. D.C. 1, 133 F.2d 368, Alford v. United States, 282 U.S. 687 (1931). The "control of cross-examination is within the discretion of the trial Judge, but it is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative." J. E. Hanger, Inc., et al v. United States, 1947, 81 App. D.C. 408,

160 F.2d 8.

In the instant case, the trial Court precluded defense counsel from even beginning to examine the complaining witness in two areas relating to the all important question of the identification of appellants as the perpetrators of the robbery and assault.

It is, of course, impossible to determine what information would have been elicited if appellants had been permitted to properly pursue their right of cross-examination and thus impossible to conclude that this error was not prejudicial to appellants.

V. COUNSEL FOR APPELLANT DAVIS IN HIS CLOSING ARGUMENT IN EFFECT CONCEDED THE IDENTIFICATION OF APPELLANTS BY THE COMPLAINING WITNESS AND FURTHER CONCEDED BY IMPLICATION APPELLANTS' GUILT.

With respect to Point V, appellants desire the Court to read the following pages of the reporter's transcript of the closing argument: Tr. C.A. p. 12.

Counsel for appellant Davis in his closing argument stated:

> Now identification under the circumstances of this case is relatively easy. Sometimes identification of people is difficult, but this was quick. Understand, it works both ways. But Mrs. Camara saw these men and she saw two men running, and then pretty soon afterward they were apprehended at the police station. It seems to me that that makes the identification easy. I am not suggesting at all that Mrs. Camara did not see these people. I am suggesting every possible reasonable doubt which I can and which it is my duty to do in defense of my client notwithstanding my personal feelings about this matter, and that is what I am undertaking to do.

It is appellants' contention that in this paragraph counsel for appellant Davis both conceded the identification and guilt of appellants.

It is not proper for defense counsel without the consent of the defendant to waive any defense advanced by defendant. Where a statement by trial counsel may have tended to persuade the jury to disregard a defense prejudicial error has been committed. See Clark v. United

States, 1958, 104 U.S. App. D.C. 27, 259 F.2d 184.

Appellants submit that the closing argument by counsel for Davis conceding their guilt constituted prejudicial error.

VI. THE TRIAL JUDGE UNFAIRLY SUMMARIZED THE EVIDENCE AND IN THIS SUMMARY AND IN HIS CONDUCT OF THE TRIAL DEMONSTRATED A BIAS AND A LACK OF IMPARTIALITY WHICH REQUIRE APPELLANTS BE GRANTED A NEW TRIAL

With respect to Point VI, appellants desire the Court to read the following pages of the reporter's transcript of the trial: Tr. 3, 4, 17, 19, 24, 29-33, 42-50, 55, 59, 60, 61, 75-77, and the reporter's transcript of the closing arguments, Tr. C.A. 12.

In his charge the the jury summarizing the evidence, the trial Judge, after noting that complainant, Mrs. Camara and her husband testified to being accosted by two men, stated "Mrs. Camara was attacked in an effort to get her pocketbook and was thrown to the ground and she struggled for her pocketbook, but eventually one of the persons charged here succeeded in getting her pocketbook." (Tr. 75-76) Thus, the trial Judge improperly characterized as fact for the jury, the very critical issue of fact to be determined by the jury, namely, the identification of appellants as the assailants of Mr. and Mrs. Camara. Notwithstanding the trial Judge's prior standard instruction that it was for the jury to find the facts and they were not bound by his comments, such a concrete assertion of fact by the trial Judge of the essential factual issue for the jury with all the persuasive prestige of a judicial utterance precluded

a fair and dispassionate consideration of the evidence by the jury. Quercia v. United States, 289 U.S. 466, 472 (1933); Blunt v. United States, 100 App. D.C. 266, 244, F.2d 355 (D.C. Cir. 1957).

The trial Judge further improperly summarized the evidence as to where the pocketbook was found when he stated in his charge to the jury (Tr. 77):

> "... Officer Boyd arrested them. One of the ladies in the house then handed to Officer Boyd a pocketbook, which Mrs. Camara identifies as being her pocketbook.
>
> So that in addition to Mrs. Camara's identification the Government relies on the fact that the two defendants were running down University Place immediately after the robbery and that they were observed by Officer Boyd, who upon hearing of the robbery immediately arrested them in the house to which they had run, and the pocketbook was also in that house."

The trial Judge's statement as fact, that the pocketbook was "in the house" in which appellants were arrested is not supported by the evidence adduced at trial.

The sole testimony of Detective Boyd, the only witness to testify as to where and how the pocketbook was obtained, was that after he had taken the appellants out of the rooming house, a Mrs. Gladys Williams called to him "Officer, there is a pocketbook, were you looking for it?", that when he first saw Mrs. Williams with the pocketbook, she was in the doorway of the rooming house and that Mrs.

Williams gave him the pocketbook (Tr. 52-53).

The record is completely silent as to where or how Mrs. Williams obtained the pocketbook. Thus the trial Judge's statement to the jury that the pocketbook was in the house was improper judicial supplementation rather than summarization of the evidence and was clearly prejudicial to appellants on the critical question of identification. Such judicial supplementation of the evidence "cut into the presumption of innocence" to which defendants are entitled, and preclude a fair and impartial consideration of the evidence. See Blunt v. United States, Supra.

The foregoing prejudicial statements, taken together with the unreasonable restrictions imposed on defense counsels' cross-examination and summary rejection of defense counsels' objections to the evidence, and the refusal to grant a hearing thereon out of the presence of the jury demonstrates a lack of impartiality on the part of the trial Judge or at least a trial so unfair as to have deprived appellants due process of law. See Peckham v. United States, 93 App. D.C. 136, 210 F.2d 693 (1953).

CONCLUSION

For the reasons stated, appellants respectfully submit that the judgments below must be reversed and the case remanded to the District Court for a new trial and a hearing on appellants' Motion to Suppress Evidence prior to such trial.

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CERTIFICATE OF SERVICE

I certify that I have personally served a copy of this brief on David C. Acheson, United States Attorney, by delivering a copy thereof to his office.

Hugh A. M. Shafer, Jr.
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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,752

DAVID BATTLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,756

MICHAEL F. DAVIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM C. WEITZEL, JR.,
ALLAN M. PALMER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Did the court unduly limit cross-examination of a complaining witness?

2) Did trial counsel for appellant Davis make an improper closing argument?

3) Did the District Court properly comment upon the evidence after it cautioned the jury that these views were not binding upon the jury and the comments were themselves supported by the evidence or fairly deducible therefrom and this is alleged as error for the first time on appeal?

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TABLE OF CASES

OTHER REFERENCES

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants were charged with robbery (22 D. C. Code § 2901) and assault with a dangerous weapon (22 D. C. Code § 502) in a two-count indictment filed April 6, 1964.

On May 20, 1964, they were tried to a jury and subsequently convicted of robbery and simple assault. Appellants were sentenced to imprisonment for a term of four years to twelve years for the robbery and one year for the assault, the sentences to run concurrently.

Mrs. Maria Camara testified that between 7:00 and 7:10 P.M. on February 22, 1964, she and her husband were walking along Euclid Street, Northwest, when they were attacked by two men (Tr. 10-11, 16). Appellant Davis struck her husband on the jaw and appellant Battle threw her to the ground in an attempt to remove her purse, which she had fallen upon. Davis then came over, tore it from her hand and the assailants ran off toward University Place (Tr. 11, 14-15, 34-35). Davis had on a reddish-brown coat and Battle wore a white one (Tr. 16-17). Shortly after the attack, Mrs. Camara saw appellants at the police precinct where she identified them as the robbers; they were clad exactly as they had been earlier (Tr. 27-28). She again identified them in the courtroom (Tr. 15). Mrs. Camara further testified that Government Exhibit No. 2 was the purse that had been stolen from her (Tr. 29-30).

Mr. Joaquin M. Camara, Jr., visiting language professor at Georgetown University, testified to his having been struck in the face the evening in question. As a result of that vicious blow he sustained two fractures of the jaw, loss of two teeth and immobilization of the jaw for nine weeks (Tr. 37, 39-40). He was unable to identify his assailants (Tr. 38).

Detective Orin B. Boyd, Metropolitan Police Department, testified that at about 7:15 or 7:20 P.M. on the evening of February 22, 1964, he and his partner were at the intersection of Fairmont Street and University Place, Northwest (Tr. 42-43). At that time he observed two men running north in the University block intersection; one was wearing a light trench coat and the other a darker trench coat. He noticed that one of them was holding something under his left arm beneath his coat, supporting the object with his right hand. They

ran into a rooming house at 1447 Fairmont Street. After receiving the robbery report of the Camaras, Officer Boyd and his partner went to the Fairmont Street address at about 7:25 P.M. A Mrs. Parker, resident manager of the rooming house, met them at the front door. Detective Boyd identified himself and inquired of her whether she had observed the two men arrive. Although she had not, she did indicate that young men did live in the house. Upon the officer's request she permitted them to enter (Tr. 43-45, 51). After proceeding to the second floor they met and conversed with Gladys Williams. As a result of this conversation Detective Boyd knocked on room number 9 and Davis opened the door. Boyd recognized the latter as one of the fellows he had seen run into the house. The officer identified himself and asked Davis for the pocketbook he had just "snatched". Davis denied knowledge of it. He was placed under arrest and the room was searched without revealing the purse. Also in the room and placed under arrest was appellant Battle (Tr. 46-48). Detective Boyd noticed that the middle finger of Davis' left hand was so swollen that he could not straighten it out (Tr. 51). A short time after appellants had been turned over to other police officers, Gladys Williams called after Detective Boyd from the doorway of the rooming house and turned over Mrs. Camaras' purse, Government Exhibit No. 2 (Tr. 52).

At the close of the Government's case the court reduced the assault count to simple assault (Tr. 57-59). The jury promptly returned its guilty verdict (Tr. 78-79).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

The court in excluding two questions asked on cross-examination did not unduly limit the cross-examiner. It did not cut off *in limine*, all inquiry into relevant areas, nor is there any indication that counsel was precluded

from developing these areas had he sought to do so by proper questioning. In the circumstances of this case, prejudicial error is not shown by this exercise of the trial court's discretion.

Trial counsel for Davis did not concede the guilt of appellants in his closing argument. When viewed in context, it is apparent that in the portion of his argument objected to he was merely advising the jury that it was easy for the complaining witness to err in identifying appellants as the assailants soon after the robbery and assault.

The court's charge to the jury was unobjected to below and therefore, cannot be asserted as error on appeal. In any event, the court cautioned the jury that its comments were only advisory not binding upon it and the comments were themselves grounded in the testimony or fairly deducible therefrom.

ARGUMENT

Introduction

On April 30, 1964, appellants filed a pretrial motion to suppress certain evidence. That motion was scheduled for a hearing before Judge Tamm on May 8, 1964, but was not reached that day. He referred the matter to the trial judge to be heard as a preliminary matter. On the day of trial the court did not follow that course nor did it hold an exclusionary hearing during the progress of the trial. A forum at some point along the way to allow appellants an opportunity to fully explore the circumstances of their arrest was required. Fed. R. Crim. P. 41(e); *Peckham* v. *United States*, 93 U.S. App. D.C. 136, 139-140, 210 F.2d 693, 697 (1953).

Should this Court reject appellants other contentions the case should be remanded, without reversing the conviction, for a hearing on the motion to suppress.[1] This

[1] Appellee had originally suggested an immediate remand of the case for such a hearing. See letter to counsel for appellants filed with the Clerk of this Court on October 8, 1964. Counsel rejected

will result in either a new trial or affirmance of the conviction. (*Henry*) *Jackson* v. *United States*, 336 F.2d 579 (D.C. Cir. 1964). See *McLindon* v. *United States*, 117 U.S. App. D.C. 283, 329 F.2d 238 (1964); *Greenwell* v. *United States*, 115 U.S. App. D.C. 44, 317 F.2d 108 (1963).

I. The court did not unduly limit cross-examination of a complaining witness.

(See Tr. 16-24)

During the course of his cross-examination of Mrs. Camara, counsel for Battle asked:

> "Q Have you had your eyes examined to determine—" (Tr. 19).

The court, *sua sponte*, excluded this question on the ground that it unnecessarily invaded the witness' privacy. At that point in the proceedings there was a luncheon recess. Upon resuming his cross-examination counsel did not question Mrs. Camara further with regard to the condition of her eyes.

It is fundamental learning that a trial court cannot cut off *in limine*, *all* cross-examination concerning a relevant subject of inquiry. *Alford* v. *United States*, 282 U.S. 687 (1931); *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937).

The instant record reveals that counsel was allowed to probe the circumstances surrounding the robbery and assault and the opportunity of the witness to observe her assailants (Tr. 16-24). Refusal to allow this single question is not the kind of limitation upon a cross-examiner that calls for reversal of a conviction. The court ostensibly only prevented inquiry into Mrs. Camara's treatment, *vel non*, by a physician or optometrist. Counsel did not seek to determine whether she experienced diffi-

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that course then and still do, pressing for reversal on this issue (Br. 28-29). The precedents however, are against them on that score. *Peckham* v. *United States*, *supra*; (*Henry*) *Jackson* v. *United States*, *supra*.

culty with her vision; saw events clearly; had headaches; was color blind to any degree; etc., nor is there any indication that the court would have refused to allow this line of questioning.

Analysis suggests that a response to the excluded question would probably not have been that revealing. If the witness did have a recent eye examination it obviously indicated that she did not need glasses, for her testimony was that she only wore sunglasses (Tr. 19). If she did not have such an examination, little could have been learned or inferred from its lack. This points up Wigmore's pertinent observation:

> "It is not doubtful that on *cross-examination*, so far as feasible by mere questions, the witness' physical capacity to observe (by sight, hearing, or the like) may be tested . . . . But mere questions on cross-examination can seldom effect much; the useful thing is usually something of a mixed nature, *i.e. experiments made in court* to test the witness' powers . . . ." (footnotes omitted). 3 Wigmore, Evidence § 993 (3d ed. 1940).

In this vein the court allowed counsel to inquire whether or not the witness wore glasses (Tr. 19). However, after the question under review was excluded, he did not follow up his initial inquiry with questions probative to the issue of the state of Mrs. Camara's perceptual equipment, (*e.g.* those suggested above), nor did he seek a courtroom experiment which could have been prepared during the recess.

Under the circumstances, exclusion of this question can hardly be deemed sufficiently prejudicial to warrant reversal of Battle's conviction. *Cf. Bass* v. *United States*, 326 F.2d 884, 890 (8th Cir.), *cert. denied*, 377 U.S. 905 (1964).

After counsel for Battle elicited from the same witness the fact that she and her husband were returning home from a drugstore at the time of the attack, he asked:

> "Q Approximately how long had you been gone from your home?" (Tr. 24).

The court excluded this question as immaterial. Counsel stated that he was pursuing this to determine the condition of Mrs. Camara at the critical time. The court responded: "I have excluded *that* question." (Tr. 24) (emphasis supplied). Counsel did not follow this up with the logical question necessary to elicit what he was obviously after, *i.e.*, "Had you been drinking that evening?" *Cf. State* v. *Tilden*, 27 Ida. 262, 147 Pac. 1056, 1061 (S.C. 1915). There is nothing to indicate that the court would have excluded *that* proper question.

In sum, appellants have merely pointed out minor, nonprejudicial exercises of discretion by the trial court which did not preclude counsel from further developing relevant areas of inquiry had he sought to do so.

II. Trial counsel for Davis did not make an improper closing argument.

(See Tr. C.A. 11-13)

Appellants contend that Davis' retained counsel, Belford V. Lawson, Jr., "both conceded the identification and guilt of appellants" (Br. 32). In advancing this contention they wrench a bit of his summation out of context to tread upon.

However, when the summation is read *in toto* it is apparent that Mr. Lawson was merely telling the jury that it was an easy matter for Mrs. Camara to identify two Negro males as the assailants soon after the attack at a time when they were in police custody, *i.e.*, easy to say yes under the circumstances, not that she did so with unerring accuracy. (See Tr. C.A. 11-13).

III. Objection to the court's comments upon the evidence comes too late on appeal; these comments, on the merits, were proper.

(See Tr. 70, 75, 78)

The charge to the jury was unobjected to by defense counsel, it cannot be claimed erroneous on appeal (Tr.

78). Fed. R. Crim. P. 30; *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

The court clearly instructed the jury that its comments were advisory and not binding upon that body (Tr. 70, 75). Further, the comments were themselves grounded in the testimony or fairly deducible therefrom. It is an abnegation of logic to say that there was insufficient support for the inference that Mrs. Camara's pocketbook came from the house appellants were arrested in (Br. 35). Hence, in the circumstances of this case, it would be inappropriate for this Court to exercise its prerogative under Rule 52(b) of the Federal Rules of Criminal Procedure. *Compare Fook* v. *United States*, 82 U.S. App. D.C. 391, 164 F.2d 716 (1947), *cert. denied*, 333 U.S. 838 (1948) (wherein the trial court made it clear to the jury that its opinion was merely advisory) *with Blunt* v. *United States*, 100 U.S. App. D.C. 266, 244 F.2d 355 (1957) (wherein an opinion of the trial court was given to the jury as a *fait accompli*; in addition other cumulative errors were found by the appellate court warranting reversal of the conviction).

CONCLUSION

Wherefore, it is respectfully submitted that the Court should remand the case for a hearing on the motion to suppress and find the remaining aspects of the trial free of reversible error.

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